ment, the ultimate result of which may be to render the constitutional guaranties illusory or wholly to abrogate them. It seems a sufficient answer to say that if and when such a result is accomplished it will be because it is "the expression of social, economic and political conditions," and that "by the prevailing morality or strong and preponderant opinion" such guaranties are no longer necessary. FREUND, POLICE POWER, § 3; *Noble State Bank* v. *Haskell, supra.* Nor should we deprecate the prospect of such a state of affairs, for after all "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." HOLMES, THE COMMON LAW, p. 1. And it is right that it should be so, for laws are made for man, not man for laws. L. H. M.

RIGHT TO SUE IN TORT FOR NEGLIGENT DELAY OF INSURANCE AGENT IN FORWARDING APPLICATION TO HOME OFFICE.—In cases where an insurance agent negligently delays in sending in an application for an insurance policy to the home office, and the thing sought to be insured is destroyed before the application is acted upon, it would seem illogical to hold that there is a liability on the part of the company for such negligence of its agent. It is a well established rule that an insurance company may reject an application for insurance without giving any reason for so doing. That being so, it is difficult to see any basis for imposing a tort liability on the company for negligent delay in acting upon such an application. But on such a state of facts it has been held that the company was liable in a tort action brought by the applicant, based upon the negligence of the agent in failing to forward the application within a reasonable time. *Boyer* v. *State Farmers' Mutual Hail Ins. Co.,* 86 Kan. 422. In that case Boyer applied for insurance on a growing crop of corn, against damages by hail. The agent negligently delayed in sending in the application, and in the meantime the crop was destroyed by a hailstorm. In allowing a recovery the court distinctly states that the action is not in contract, but is based upon the negligence of the company's agent in not forwarding the application until too late to be of any benefit to the applicant. This decision was followed in *Wilkin* v. *Capital Fire Ins. Co.,* 99 Neb. 828, three justices dissenting, but the same court later reversed itself in *Meyer* v. *Central State Life Ins. Co.,* 103 Neb. 640. By statute it may be provided that an application for such insurance shall be deemed accepted unless rejected within a specified time. See *Wanberg* v. *Ins. Co.,* (N. Dak.), 179 N. W. 666, 19 MICH. L. REV. 340.

A further difficulty is presented where the application is for a policy of life insurance. Where the agent, in such a case, negligently delays in sending in the application, and the applicant dies before his application has been acted upon, it would seem that an action of tort, brought by the administrator of his estate, could not under any circumstances be maintained. And yet, on precisely that state of facts, the Supreme Court of Iowa allowed a recovery by the administrator. *Duffie* v. *Bankers Life Ass'n.,* 160 Ia. 19. In that case it was held that it is the duty of an insurance company to act promptly on an application for insurance, and to notify the applicant of its

action, and that where the company, either directly or through its agents, is negligent in this respect, it cannot avoid responsibility by the fact that the application had not been received and acted upon prior to the applicant's death. This decision was favorably commented on in a note in 27 HARV. L. REV. 92. See also a note in 11 MICH. L. REV. 606, where the writer, in commenting on the *Duffie* case, says, "but the novel feature of this case is the holding that an action *ex delicto* lies against the insurer. It would be a strange doctrine if ordinary private parties were held liable for negligence in failing to accept or reject a proposed offer." And indeed that does present a logical difficulty which the Iowa court apparently overlooked. An application for insurance is in reality nothing more than an offer on the part of the applicant to enter into a contract with the company, and it is difficult to see why the negligent delay of the company in failing either to accept or reject it should give rise to a tort liability for such delay. It would seem that the same difficulty would prevent a recovery in cases like the *Boyer* case, above cited, but the question does not appear to have been considered.

But a greater obstacle in the way of a recovery in life insurance cases was brought out by the court in a recent Illinois decision. *Bradley* v. *Federal Life Ins. Co.*, 129 N. E. 171. There the applicant was solicited by an agent of the defendant company to take out an accident policy. He accordingly filed an application and paid a sum of money to keep the policy in force for a period of three months. The agent negligently delayed in forwarding the application, and in the meantime the applicant was accidentally killed. The administrator of his estate brought the action in tort to recover the amount of insurance which the decedent had applied for, basing his claim on the negligence of the agent. It was held that no right of action could accrue or survive to the administrator. The difficulty which the court deems insurmountable is that if any right of action accrued at all, which point the court declines to decide, it would accrue to the applicant, and such a right of action could not survive his death. In commenting on *Duffie* v. *Bankers Life Ass'n.*, *supra*, the court says, "the question of the action accruing or surviving does not appear to have been raised." Indeed if the point had been raised it would be difficult to justify the decision on any logical basis.

There is no question but that the action, if any does accrue in such a case, must be in tort, for clearly there is no contractual relationship, either express or implied, between the parties. The overwhelming weight of authority is that the insurer is not liable *ex contractu* for such delays. *N. W. Mutual Life Ins. Co.* v. *Neafus*, 145 Ky. 563; *More* v. *N. Y. Bowery Ins. Co.*, 130 N. Y. 537; *Brink* v. *M. & F. M. N. Ins. Ass'n.*, 17 S. D. 235. Furthermore it is clear that the action would accrue to the applicant, if to anyone, and under the well established rule that tort actions do not survive, it is indeed difficult to see how the administrator could logically be held to have a cause of action. Even to hold that a cause of action accrues to the applicant is impossible to justify on any logical basis, and a holding, not only that such a right of action accrues, but also that it survives the death of the applicant, is a doctrine not in conformity with reason or sound legal principles.

P. W. G.

VALIDITY OF STATUTE REQUIRING HOTELS, RESTAURANTS, ETC., USING FOREIGN EGGS TO POST NOTICE OF USE.—A statute of Washington regulates the sale, labelling and marking of eggs. After dealing with the branding of cold storage, preserved, and eggs imported from foreign countries, the statute provides that all restaurants, hotels, bakeries, and confectioners using or serving foreign eggs must place a sign in some conspicuous place, to read, "We use foreign eggs." In an action for a permanent injunction to restrain the enforcement of the provision set out above, on the ground of unconstitutionality, *held*, the act being within the police power of the state and not regulating foreign commerce, is constitutional. *Parrot & Co.* v. *Benson*, (Wash., 1921), 194 Pac. 986.

The courts will not declare a statute invalid unless its conflict with the constitution is plain. *Atchinson T. & S. F. R. Co.* v. *Mathews*, 174 U. S. 96; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265. The statute in the principal case was sustained on the ground that it was a proper police measure, intended for the protection of the public from the sale of stale and unwholesome eggs and was not an unjust discrimination nor an unreasonable restriction. The police power includes within its scope not only public health, morals and safety but also regulations designed to promote the general welfare, prosperity and the public convenience. *Chicago R. Co.* v. *Illinois*, 200 U. S. 561; *Noble State Bank* v. *Haskell*, 219 U. S. 104. That trades may be regulated in the exercise of the police power is well settled. *Schmidinger* v. *Chicago*, 226 U. S. 578. Plainly a regulation protecting the public from the sale of unwholesome eggs is a proper police measure. But to constitute a valid exercise of the police power the means must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. There must be a real and substantial relation between the means used and the purpose to be accomplished. *Lawton* v. *Steele*, 152 U. S. 133. However, if a state of facts can be reasonably presumed to exist which would justify the act, the court must presume that it did exist and that the law was passed for that reason. *Otis* v. *Parker*, 187 U. S. 606.

In the principal case there were facts tending to show that eggs imported from China were produced and shipped under conditions if not unwholesome, that at least might justify the consumer in preferring domestic eggs to such foreign eggs. The statute in question requires identification of imported eggs and permits such choice. It does not, however, effect its purpose—the protection of the public from the sale of unwholesome eggs. It does not even tend to accomplish that end. Imported eggs are not necessarily stale nor unwholesome. Nor are domestic eggs necessarily fresh and wholesome. While it is true that a classification having some reasonable basis does not offend against the equal protection clause merely because it is not made with mathematical nicety, (*Lindsey* v. *Carbonic Gas Co.*, 220 U. S. 61), still there must be some reasonable basis and that is lacking in this case. The basis of the restriction is the place from which the article comes, not the distance nor the time consumed in shipment. The quality and purity of the eggs is not the real aim of the law, nor does it accomplish that purpose. The act has no substantial relation to the objects for which the police power may be validly exercised

and moreover it invades the rights of the individual to engage freely in business; for those reasons it is involid. *Frost* v. *Chicago,* 178 Ill. 250. The real purpose of the law seems to be to aid the domestic producer of eggs, by appealing to the prejudices of people against eggs produced in a foreign land. The state may not under the guise of the police power enact laws which do not pertain to police purposes, but which do impose onerous burdens on business. *Ex parte Hayden,* 147 Cal. 649. Upon these grounds a similar statute regulating the sale of foreign eggs was held unconstitutional in *Matter of Foley,* 172 Cal. 744. In *State* v. *Jacobson,* 80 Or. 648, such a statute was held to be unconstitutional as being in conflict with the commerce clause of the constitution.

The power to regulate foreign commerce is exclusively in the Congress of the United States. *Henderson* v. *New York,* 92 U. S. 259. The statute in the principal case deals with a recognized commodity of international commerce and places restrictions upon its sale. It discriminates against goods of foreign origin by reason of their origin alone. The restrictions placed upon the sale of foreign eggs must of necessity interfere and obstruct the freedom of transportation and exchange between this and foreign countries, which such articles on their merits would otherwise have. Such state interference with foreign commerce is unjustified. *Welton* v. *Missouri,* 91 U. S. 275. The decision in the principal case in dealing with this problem of interference with foreign commerce, considered the egg after reaching the hotel or restaurant, as no longer an article of foreign commerce. But unless the commerce clause could prevent such discrimination, the power of Congress to regulate foreign commerce exclusively would be incapable of enforcement. The power, however, does reach to the interior of every state so far as it is necessary to protect products of other countries from discrimination by reason of their foreign origin. *Guy* v. *Baltimore,* 100 U. S. 434. To enforce this statute would be in effect to permit the state to discriminate against or prohibit indirectly the importation of foreign eggs. This cannot be allowed. *Collins* v. *New Hampshire,* 171 U. S. 30. The power of Congress to regulate commerce does not effect the surrender of the police power of the state. Where the purpose is proper and the law does not directly interfere with commerce, the police power of the state may be exercised. Thus a Massachusetts statute to prevent the manufacture or sale of oleomargarine colored to imitate butter, was held a valid exercise of the police power to prevent deception and cheating of the public, although it did interfere indirectly with interstate commerce. *Plumley* v. *Massachusetts,* 155 U. S. 461. As shown, there was no valid exercise of the police power in the form of the statute involved in the principal case, therefore the interference with foreign commerce there attempted was unjustified. The Washington court has failed utterly to apply properly the well defined principles controlling the exercise of the police power and the interference with foreign commerce by the state. The decisions in *Matter of Foley, supra,* and *State* v. *Jacobson, supra,* holding contra to the principal case, are sound. J. P. T.